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## RESOLVING MATURE MASS TORT LITIGATION

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### INTRODUCTION

This is the third in a series of articles designed to propose a functional approach for managing complex litigation.<sup>1</sup> These articles argue that sufficient flexibility exists in our civil litigation system to include and encourage evolving forms of dispute resolution and that effective judicial management and increased use of cooperative and inquisitorial techniques in experimental applications will lead inductively to superior approaches for coping with difficult cases.

The traditional view of the civil litigation system as an individualized, rights-based adjudicatory system dedicated to victim compensation has faced mounting pressures in recent years. In particular, the litigation process has been challenged by notions that emphasize the collective interests of society by centralizing rulemaking and by fostering inquisitorial fact-finding.<sup>2</sup> The paradigm cases for these alternative views are "mature mass torts" or mass tort litigation, where there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted. The East Texas asbestos class action in *Jenkins v. Raymark*<sup>3</sup> and the Dalkon Shield bankruptcy in *In re A.H. Robins Company*<sup>4</sup> are examples of mature mass tort litigation.

Part I of this Article is a study of the *Jenkins v. Raymark* class action. The case study methodology begins with a statement of the problems confronted by the court and a description of the court's diagnosis of those problems—a

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<sup>1</sup> McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986) (utilizing a case study approach to reason inductively concerning case management in complex cases); McGovern, *Management of Multiparty Toxic Tort Litigation: Case Law and Trends Affecting Case Management*, 19 FORUM 1 (1983).

<sup>2</sup> See, e.g., Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984).

<sup>3</sup> 109 F.R.D. 269 (E.D. Tex. 1985) (ordering class certification of all pending personal injury asbestos cases in the Eastern District of Texas), *aff'd*, 782 F.2d 468 (1986).

<sup>4</sup> 88 Bankr. 742 (E.D. Va. 1988) (confirmation of proposed reorganization plan).

discussion of the factors that seem to drive perceived difficulties in case management. A proposed procedural solution to the problems follows, including a detailed discussion of the effects of this prescription on the parties, the issues, and the information generated to assist decision-making. The case study method concludes with a description of the results of the proposed procedural innovation evaluated from various perspectives. These perspectives include: (1) economic effects—the cost in time and money of the new process, as well as any opportunity or error costs; (2) fairness—values of predictability, rationality, and equality of opportunity and strategy; and (3) other less tangible values—the way the procedure affects the dignity and autonomy of the individual party, the litigant's sense of participation and control, the public's right to information and full disclosure, and the values informing the applicable substantive law.

Part II of the Article repeats the case study methodology in examining *In re A.H. Robins Company*. Part III then proposes alternative functional approaches for managing mature mass torts based upon the experience gained from the procedural innovations advanced in the two case studies. Some of these alternatives are currently available for use and some others would require a change in various existing laws, rules, and procedures. Analysis of the two cases suggests that the benefits of these innovations, in the context of mature mass torts, promise to make the proposed changes worthwhile.

## I. ASBESTOS LITIGATION: HAS JUDGE ROY BEAN RETURNED?

### A. Problem

East Texas is the fertile crescent of asbestos litigation. One of the first asbestos disease workers' compensation claims was resolved there;<sup>5</sup> the first major jury verdict and appellate opinion came from there;<sup>6</sup> and, the first group settlement occurred there.<sup>7</sup>

Between 1981 and 1982, when the Manville Corporation filed for bankruptcy,<sup>8</sup> 379 asbestos claims were filed in the federal courts of the Eastern

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<sup>5</sup> See P. BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 34 (1985).

<sup>6</sup> *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1102 (5th Cir. 1973) (affirming a \$68,000 jury verdict against asbestos manufacturer based on a theory of strict liability), *cert. denied*, 419 U.S. 869 (1974). See also Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 164 (1984) (characterizing the *Borel* opinion as representative of "the dawning of the asbestos litigation era").

<sup>7</sup> P. BRODEUR, *supra* note 5, at 73-93.

<sup>8</sup> *In re Johns-Manville Corp.*, Nos. 82 B 11,656 - 82 B 11,676 (Bankr. S.D.N.Y. filed on Aug. 26, 1982).

District of Texas.<sup>9</sup> During the same two year period 164 asbestos cases were resolved,<sup>10</sup> for an overall filing to disposition ratio of approximately 2.31. Between 1982 and 1985 an additional 1,412 cases were filed and 154 cases were resolved,<sup>11</sup> for an overall filing to disposition ratio of 9.17. A study on total asbestos claims pending in the federal court system estimated that by December of 1984, 29% of all pending civil litigation in the Eastern District of Texas consisted of asbestos claims,<sup>12</sup> with 1200 asbestos cases pending in that year alone.<sup>13</sup>

Judge Robert M. Parker was appointed to the federal bench in the Eastern District of Texas in May of 1979. During the first two years of his judicial appointment, asbestos cases filed in all federal district courts jumped from 272 in 1978 to 1,450 in 1980.<sup>14</sup> His efforts at case management constitute a microcosm of the courts in both the Eastern District of Texas and nationwide to cope with the dramatic increase in asbestos litigation.<sup>15</sup>

In 1980, Judge Parker conducted his first asbestos case to a jury in a traditional first-come, first-served manner.<sup>16</sup> As his work progressed, Judge Parker concluded that the traditional automobile accident model of dispute resolution<sup>17</sup> simply failed to move all the asbestos cases filed in his court through the python of the litigation process. Judge Parker also experienced a

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<sup>9</sup> T. WILLGING, TRENDS IN ASBESTOS LITIGATION 118 (1987).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* In 1981, Judge Parker stated that the "[h]uge oil refineries and petrochemical plants in the southern end of the district have partially accounted for the existence of over three thousand plaintiffs within the Eastern District alone." *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1354 (E.D. Tex. 1981), *rev'd in part*, 681 F.2d 334 (5th Cir. 1982).

<sup>12</sup> D. HENSLER, W. FELSTINER, M. SELVIN & P. EBENER, ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS 26 (1985) [hereinafter D. HENSLER].

<sup>13</sup> *Id.* at 27.

<sup>14</sup> T. WILLGING, *supra* note 9, at 119.

<sup>15</sup> Another jurisdiction which has attempted to cope with the large influx of asbestos cases is the Eastern District of Pennsylvania. Courts there have a single jury hear a small group of cases that are similar in the injury sustained, the exposure suffered, and the defendants involved. The liability questions are heard once for the entire group of cases and then individually for evidence on damages. D. HENSLER, *supra* note 12, at 64-65.

<sup>16</sup> T. WILLGING, *supra* note 9, at 97.

<sup>17</sup> See D. HENSLER, *supra* note 12, at 49-52 (noting the difficulties of applying traditional common law procedures to asbestos litigation); NATIONAL CENTER FOR STATE COURTS, JUDICIAL ADMINISTRATIVE WORKING GROUP ON ASBESTOS LITIGATION: FINAL REPORT WITH RECOMMENDATIONS 17-27 (1984) (describing model standing order for asbestos litigation); Rosenberg, *supra* note 2, at 855-59 (commenting that the difficulties in proving causation and the substantial costs of litigating mass exposure claims on a case-by-case basis frustrates the tort system and makes such claims unattractive).

high level of frustration from witnessing inefficient resource allocation by the parties.<sup>18</sup> He began, therefore, to devote substantial attention to devising new systems for resolving these disputes.

First, Judge Parker focused on pre-trial problems. Although the Judicial Panel on Multidistrict Litigation ("JPML")<sup>19</sup> declined to transfer all asbestos cases pending in federal courts to one jurisdiction under multidistrict litigation,<sup>20</sup> Judge Parker created a unified pre-trial order that standardized and abbreviated the discovery process.<sup>21</sup> In particular, his order eliminated redundant depositions and discovery motions and shortened time periods available for discovery. Judge Parker also experimented with the asbestos trial process. For example, he empanelled five juries to hear five different cases at the same time;<sup>22</sup> the juries heard evidence on liability issues common to all plaintiffs and then heard individualized causation and damage evidence separately. Three juries returned verdicts for plaintiffs and two decided in favor of defendants.<sup>23</sup> The lack of consistency in outcomes doomed this method.

Facing virtually identical evidence on liability in case after case and a preponderance of verdicts for plaintiffs on the factual issues, in 1980 and then again in 1981, Judge Parker ruled that offensive collateral estoppel, or in the alternative, *stare decisis* or judicial notice, precluded a defendant's

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<sup>18</sup> See J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM & M. SHANELY, VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 86-91 (1984) [hereinafter J. KAKALIK].

<sup>19</sup> The Judicial Panel on Multidistrict Litigation was created by Congress to coordinate or consolidate pretrial proceedings when "civil actions involving one or more common questions of fact are pending in different districts." 28 U.S.C. § 1407(a) (1982 & Supp. IV 1986). See generally D. HERR, MULTIDISTRICT LITIGATION 7-17 (1986) (overview of Judicial Panel on Multidistrict Litigation including legislative history of the enabling statute).

<sup>20</sup> *In re Asbestos and Asbestos Insulation Materials Prods. Liab. Litig.*, 431 F. Supp. 906, 910 (J.P.M.L. 1977) (refusing consolidation and multidistrict proceedings of 103 asbestos personal injury claims on the grounds that the differences in the cases outweighed the common factual points and the nearly unanimous opposition of the parties to the transfer).

<sup>21</sup> See, e.g., *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 348-52 (5th Cir. 1982) (reversing Judge Parker's decision on collateral estoppel grounds, but presenting a copy of his uniform pre-trial order in an appendix as an example of innovative ideas in resolving asbestos injury claims).

<sup>22</sup> *Marks v. Fibreboard Corp.*, No. B-80-621-CA; *Migues v. Nicolet, Inc.*, No. B-78-768-CA; *Gracedel v. Fibreboard Corp.*, No. B-80-658-CA; *Robison v. Fibreboard Corp.*, No. B-81-488-CA; *Babineaux v. Fibreboard Corp.*, No. B-81-323-CA (E.D. Tex. July 12-23, 1982) (cited in Green, *supra* note 6, at 222 n.441).

<sup>23</sup> See Green, *supra* note 6, at 222-23 (noting inconsistencies in the consolidated five-jury findings despite procedural uniformities).

future assertion that it was not liable for asbestos related injuries.<sup>24</sup> The Fifth Circuit Court of Appeals reversed his ruling in both cases.<sup>25</sup>

Judge Parker then consolidated thirty plaintiffs for one jury trial, first on the common issues and then on individual causation and damage issues for each plaintiff.<sup>26</sup> The jury awarded \$7.9 million to the first four plaintiffs, and the remainder of the consolidated cases settled.<sup>27</sup>

Notwithstanding these innovative measures, the Eastern District's overall asbestos caseload stood, by June 30, 1986, at 2,480 cases filed and 469 cases tried or settled.<sup>28</sup> Although an amazing volume of asbestos cases had been tried and settled, an even greater number had been filed in the interim.

### B. *Diagnosis*

The roughly contemporaneous filing of large numbers of asbestos disease cases in selected jurisdictions throughout the United States has created excessive demands for the most scarce resource in the litigation system—judicial trial time.<sup>29</sup> Although most of the cases eventually settled, these settlements generally occurred only after each plaintiff had been given a trial date. This situation was particularly acute in the Eastern District of Texas. The challenge was to have cases settle sooner without clogging the docket with unnecessary trial dates.

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<sup>24</sup> *Migues v. Nicolet Indus., Inc.*, 493 F. Supp. 61 (E.D. Tex. 1980), *rev'd in part* by *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1981); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd in part*, 681 F.2d 334 (5th Cir. 1982).

<sup>25</sup> *Migues v. Fibreboard Corp.*, 662 F.2d 1182 (5th Cir. 1981); *Hardy v. Johns-Manville*, 681 F.2d 334 (5th Cir. 1982).

<sup>26</sup> *Newman v. Johns-Manville*, No. M-79-124-CA (E.D. Tex. 1984), *mandamus denied sub nom. In re Armstrong World Indus.*, No. 84-2690 (5th Cir. Nov. 26, 1984) (cited in T. WILLGING, *supra* note 9, at 89 n.222). For a background discussion of the use of collateral estoppel in asbestos litigation, see generally, Green, *supra* note 6; Special Project, *Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 659-89 (1983). See also, Motomura, *Judgments as Evidence*, 70 MINN. L. REV. 979, 1031-36 (1986) (discussing the effects of prior proceedings and collateral estoppel on nonparties).

<sup>27</sup> See D. HENSLER, *supra* note 12, at 65 (adding that "it is not known whether the 5th Circuit would have approved the consolidation procedure or sustained the verdict had settlement not been reached").

<sup>28</sup> T. WILLGING, *supra* note 9, at 118.

<sup>29</sup> Forty percent of all asbestos filings recorded in the late seventies and early eighties occurred in the districts of Massachusetts, Eastern Texas, and Southern Mississippi. At the circuit level, the district courts in the first and fifth circuits accounted for fifty-two percent of all asbestos disease filings. The primary effect in these selected courts was "that the cases . . . disrupt[ed] the ordinary operations of the court." *Id.* at 12-15.

Part of the reason for the clogged East Texas trial docket was that jury verdicts in personal injury cases in East Texas are generally high, particularly in asbestos cases.<sup>30</sup> Defense coordinators for mass tort cases generally believe that East Texas values are unconscionably high in comparison to identical cases in other parts of the country. Plaintiffs' attorneys, on the other hand, complain that defendants will not settle cases at their full trial value, compelling the high number of trials. Defense attorneys, in response, argue that some plaintiffs' attorneys are more concerned with maintaining a reputation for obtaining high awards than with insuring that their clients receive a fair award in a timely fashion.<sup>31</sup> In particular, it appears easier to obtain new cases if a plaintiffs' attorney can point to high verdicts rather than early settlements. Some plaintiffs' attorneys, appearing to take a middle approach, aggravate settlement difficulties by resolving their disputes with a few defendants, obtaining some money for their clients, only to push for full trial value from the remaining defendants.<sup>32</sup>

In addition, defendants argue that an agreement to settle cases at a high value in Texas would generate unfavorable precedent. To avoid this dangerous precedent, these defendants prefer to pay jury trial outcomes over acquiescing to equally high settlements. At the same time, a general perception persists among defendants that East Texas judges are plaintiff-oriented,<sup>33</sup> and that early settlement agreements might encourage unwarranted pro-plaintiff behavior in other jurisdictions.

Finally, concerns specific to asbestos litigation also constitute impediments to early settlement. Prior to Manville's filing for bankruptcy in 1982, for example, a reasonably defined hierarchy of asbestos defendants and their insurers solidified;<sup>34</sup> through trial and error, the defendants had created a rough equilibrium of relative settlement contributions for cases in any par-

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<sup>30</sup> See J. KAKALIK, *supra* note 18, at 38 (noting that of the eight states that closed the highest number of asbestos disease claims, Texas settlement values were among the highest).

<sup>31</sup> See, e.g., Coffee, *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 713 (1986); Rosenberg, *supra* note 2, at 890 n.158 (discussing potential reputational concerns of plaintiffs' attorneys in selecting mass exposure claims).

<sup>32</sup> On the other hand, some defendants have pursued a "siege mentality" strategy towards reasonable settlement efforts, forcing plaintiffs' attorneys to go to trial rather than settle. Levy, *The Manville Bankruptcy—Its Effect on the Asbestos Industry*, in SPECIAL PROBLEMS IN TOXIC SUBSTANCES LITIGATION AFTER MANVILLE 1983, at 5, 13-14 (1983).

<sup>33</sup> See Arthurs, *Texas Judge Rides Herd on Asbestos Suits*, Legal Times, May 19, 1986, at 4 (statement of Richard Josephson, asbestos defense counsel for Owens-Illinois, Inc.).

<sup>34</sup> See Levy, *supra* note 32, at 14.

ticular jurisdiction. In the absence of Manville, and with a substantial increase in insurance coverage litigation,<sup>35</sup> it became increasingly difficult to coordinate all the defendants in putting together a settlement fund in any given case prior to trial.<sup>36</sup> Some defendants, typically those with large amounts of insurance or very few resources, tended toward early settlements in order to reduce transaction costs as well as the risk that plaintiffs' cases would increase in value. Other defendants, generally those with less insurance coverage or with moderate or limited resources, desired to prolong the pre-trial process to conserve indemnity dollars and slow the velocity of payments.<sup>37</sup> This was particularly true if their insurance provided for unlimited defense costs as well as continuing indemnity coverage.

The advent of the Asbestos Claims Facility ("CF")<sup>38</sup> in June 1985, changed the expectations of many parties concerning the opportunities for settlement. Defendants and insurance carriers had been negotiating for more than four years in an attempt to coordinate their defense strategies. Some judges and plaintiffs' attorneys anticipated that once a common defense

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<sup>35</sup> See, e.g., *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981) (after losing jury verdict, three insurance companies appealed on the grounds that exposure to asbestos and not the manifestation of asbestos related injuries was the appropriate coverage trigger), *cert. denied sub nom. Aetna Casualty & Surety Co. v. Porter*, 454 U.S. 1009 (1981); *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1239 (6th Cir. 1980) (suit by insurance company against asbestos coverage policyholder to obtain judicial sanction of its manifestation theory), *cert. denied*, 454 U.S. 1009 (1981); *In re Asbestos Ins. Coverage Cases*, California Judicial Coordination Proceeding No. 1071 (1981) (suit by five manufacturers against over sixty-five insurance companies to compel coverage).

<sup>36</sup> See P. BRODEUR, *supra* note 5, at 289-98 (noting the difficulty of Manville's co-defendants in reaching an accord in the Wellington Group talks). For a discussion of the Wellington Group's activities in asbestos claim resolution, see Wellington, *Toxic Torts: Managing the Asbestos Problem*, 31 YALE L. REP. 20 (1985).

<sup>37</sup> An example of this type of trial strategy would be the litigation tactics of UNR Industries, whose prolonging of the judicial process reflected either its increasing cash-flow problems or possibly an effort to create a legislative solution to its asbestos liability problems. Levy, *supra* note 32, at 14.

<sup>38</sup> The Asbestos Claims Facility was a joint effort by asbestos manufacturers and insurers to cut overhead costs by streamlining injured worker claims resolution. See D. HENSLER, *supra* note 21, at 31. See generally Comment, *Asbestos Claims Facility—An Alternative to Litigation*, 24 DUQ. L. REV. 833 (1986) (reviewing the problems associated with asbestos litigation that led to the formation of the Asbestos Claims Facility and outlining the Facility's proposals dealing with these problems). Difficulties arose at the Facility, however, when plaintiffs, whose disability or cause of action was more unclear or questionable than past plaintiffs, began to file claims. See *Asbestos Coalition Falling Apart*, Nat'l L.J., Apr. 25, 1988, at 3, col. 2 [hereinafter *Falling Apart*]. As a result, many of the biggest contributors and supporters of the Facility left the group. *Id.* at 1, col. 3.

mechanism was established, disputes among defendants would disappear and case resolutions would accelerate dramatically. In some jurisdictions, a hiatus in settlements occurred in anticipation of the opening of the Asbestos Claims Facility.

The members of the Asbestos Claims Facility, however, were not interested merely in increasing the rate of settlements. They shared major concerns that the quality of new filings was deteriorating—that is, more recently filed cases involved less serious, if any, asbestos-related injuries. The members also felt that the velocity of case resolution was already too high to accommodate limited defendant resources. Substantial conflicts in claims-handling practices among the various members of the facility fueled perceptions among the plaintiffs' bar that a hard-line trial strategy predominated. This rang particularly true in East Texas where the plaintiffs' attorneys concluded that the only way to resolve cases with the facility was by jury trial. Yet, there is some evidence to the contrary: prior to the formation of the facility, roughly 6,000 asbestos disease cases had been settled, but during its brief two year existence, 19,000 were settled.<sup>39</sup>

Finally, the availability of punitive damages posed another obstacle to the settlement of asbestos cases. Prior to *Burk Royalty Co. v. Walls*,<sup>40</sup> the Texas Supreme Court had consistently held that the standard for punitive damage awards was "an entire want of care" on the part of a defendant.<sup>41</sup> Therefore, punitive damages were rarely awarded in personal injury cases. Following *Burk Royalty*, however, the test became whether "the defendant was consciously, i.e., knowingly, indifferent to . . . rights, welfare, and safety."<sup>42</sup> The uncertainty associated with this new threat of punitive damage awards later became important in negotiations. Settlement values that were arguably high went even higher. Yet, Judge Parker did not submit a punitive damage issue to a jury in an asbestos case until 1984, after *Jackson v. Johns-Manville*.<sup>43</sup> The only punitive damages awarded by a jury in his court was the \$1 million to each of the first four plaintiffs in his thirty plaintiff consolidation case.<sup>44</sup> Thus, the dual threats of either a large punitive damage award or no punitive damage award at all may have created some incentives for settlement due to the natural risk aversion on each side.

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<sup>39</sup> See *Falling Apart*, *supra* note 38, at 3, col. 2.

<sup>40</sup> 616 S.W.2d 911 (Tex. 1981) (action to recover exemplary damages for the gross negligence of employer and district supervisor in the death of worker killed in oil well fire).

<sup>41</sup> *Id.* at 922.

<sup>42</sup> *Id.*

<sup>43</sup> 727 F.2d 506 (5th Cir. 1984) (holding that punitive damages were inappropriate under Mississippi law where "the allowance [of punitive damages] carries manifest portent of undoing the strict liability remedy for present and prospective claimants and where the purposes of punitive damages are otherwise served").

<sup>44</sup> See *supra* note 30 and accompanying text.



### C. Prescription

Judge Parker had tried first-come, first-served trials, test cases, multiple juries, collateral estoppel, and consolidation. He had used neither reverse bifurcation—trying causation and damages first and liability later—nor a class action. He decided on the latter. By first having a single trial on liability, common defenses, and punitive damages for all plaintiffs, Judge Parker thought that he would place the cases in a posture where they could settle or, at worst, where they would need only abbreviated trials on individual causation and damages.<sup>45</sup> He concluded that a mandatory class pursuant to Rule 23(b)(1)(B) of the Federal Rules of Civil Procedure was not certifiable because of the lack of evidence of a limited fund.<sup>46</sup> His only alternative, then, was to assemble a 23(b)(3) voluntary class.

Upon a motion filed by plaintiffs who were concerned that their cases might not come to trial in the near future, Judge Parker certified a class action styled *Jenkins v. Raymark* and granted an interlocutory appeal.<sup>47</sup> The Fifth Circuit Court of Appeals affirmed the class certification writing: "The courts are now being forced to rethink the alternatives and priorities by the current volume of litigation and more frequent mass disasters."<sup>48</sup>

#### 1. Parties

The class consisted of all plaintiffs who had filed an asbestos disease suit in the Eastern District of Texas prior to December 31, 1984. Of the 805 potential class members, fifty-two opted out, their attorneys concerned that the class action approach might deprive them of control over their own cases and afraid that any lump-sum resolution would short change their clients.<sup>49</sup> Four counsel representing 534, eighty-nine, sixty-three, and forty-six respective plaintiffs, became class counsel. The Judge appointed a lead counsel and a counsel committee with all four class counsel as members. Two of the plaintiffs' lawyers were noted for their propensity to try cases to a jury verdict, but two had a reputation for working toward a settlement,<sup>50</sup> if

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<sup>45</sup> See *Jenkins v. Raymark Indus.*, 109 F.R.D. 269, 282 (E.D. Tex. 1985) (concluding that once the classwide issues were tried, the class members could return for consolidated "mini-trials" on the individual issues).

<sup>46</sup> *Id.* at 276 (determining that the estimated settlement value of the class was well below the available insurance coverage, thus failing to show a "substantial probability" that a limited fund existed).

<sup>47</sup> *Id.* at 287 (pointing out that the order granting class certification involved questions of law "as to which there are substantial grounds for difference of opinion and that an immediate appeal . . . would materially advance the ultimate termination of the litigation").

<sup>48</sup> *Jenkins v. Raymark Indus.*, 782 F.2d 468, 474 (5th Cir. 1986).

<sup>49</sup> For a general description of the *Jenkins* class action device and the strategies of the parties involved, see Arthurs, *supra* note 33, at 5-7.

<sup>50</sup> See generally Shorten Texas Helps Injured Workers: Lawyer is 'King of Asbestos Litigation', L.A. Times, Feb. 12, 1989, at 23, col. 1.

possible, to avoid trial. There were thirteen named trial plaintiffs who represented the class.

There were also thirteen named defendants. Eight were represented by a single counsel selected by the Asbestos Claims Facility on liability issues and then by separate counsel for each facility defendant on punitive damages issues. Five defendants had their own respective counsel but generally deferred to the facility trial lawyer as lead counsel.

## 2. Issues

The plaintiffs contended that the defendants' products containing asbestos were defective—that is, unreasonably dangerous, because of the defendants' failure to warn potential users of health hazards caused by exposure to asbestos.<sup>51</sup> The defendants asserted the state-of-the-art defense: they could not possibly warn of hazards associated with exposure to asbestos until they were aware, or should have been aware, of those hazards.<sup>52</sup> The defense evidence varied considerably from defendant to defendant and from product to product, but the general thrust was that the specific types of harms suffered by the plaintiffs were simply unknowable risks at the time they were exposed to asbestos. The plaintiffs countered by arguing that the

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<sup>51</sup> See, e.g., Ozonoff, *Failed Warnings: Asbestos Related Disease and Industrial Medicine*, in *THE HEALTH AND SAFETY OF WORKERS* 139, 185-207 (R. Bayer ed. 1988) (discussing studies from the 1930s and 1940s, some of which asbestos manufacturers were aware of, that indicated the health risks of asbestos exposure); P. BRODEUR, *EXPENDABLE AMERICANS* 109-17 (1973) (noting manufacturer's failure to warn asbestos workers at Tyler, Texas plant); THE ATTORNEY GENERAL'S ASBESTOS LIABILITY REPORT TO CONGRESS, 97th Cong., 1st Sess., 35-47 (1981) (presenting a series of letters between various members of the asbestos industry used by plaintiffs in lawsuits against the industry to contend that members of the industry failed to release data on the relationship between asbestos exposure and disease). See also Landau, *Toxic Tort Litigation 1983*, in *SPECIAL PROBLEMS IN TOXIC SUBSTANCES LITIGATION AFTER MANVILLE* 1983, at 323, 325-44 (1983) (setting forth, examples of Navy correspondence linking the leading manufacturers with asbestos; a publication showing asbestos laborers working aboard ships without protection during the Second World War; and pictures of the Johns-Manville logo on asbestos type insulation at a 1953 job site, so that the "accident scenes" could be recreated and products identified).

<sup>52</sup> While the state-of-the-art defense is a viable option in a Texas courtroom, other jurisdictions, such as New Jersey, have eliminated the defense in the context of strict liability claims. See *In re Asbestos Litig.*, 628 F. Supp. 774, 775-80 (D.N.J. 1986) (holding that the elimination of the state-of-the art defense was not violative of a defendant's equal protection rights); *Beshada v. Johns-Manville*, 90 N.J. 191, 204, 447 A.2d 539, 546 (1982) (denying the state-of-the-art defense in a trial involving six consolidated asbestos cases).

defendants not only knew of the dangers from use of their products but were consciously indifferent in exposing plaintiffs to them.

From previous trials, discovery, and special submissions by the defendants to the court, Judge Parker prepared a notebook containing a comprehensive product list, complete with the text of warnings attached to each and every asbestos product to which plaintiffs alleged exposure. The notebook also indicated when each product first carried a warning. Judge Parker planned to give the notebook to the jurors and to submit special issues to them, inquiring when each of the thirteen defendants knew, or should have known, the types of hazards associated with each of their products. Finally, the jurors would receive special interrogatories concerning each defendant's alleged conscious indifference. If they found that punitive damages were warranted, they would be asked to specify an appropriate amount. Judge Parker had originally considered asking the jurors for a single dollar amount. After the Fifth Circuit's interlocutory opinion, he decided to request that the jury decide a single number—such as zero, one-half, one or three—that he would then multiply by each eventual award of compensatory damages to compute the punitive award. The jury's findings on all of the common issues would then be applied to the entire class.

### 3. Information

Aside from the usual decisions common to any asbestos trial concerning liability and state-of-the-art, Judge Parker would also have asked the jury to determine a multiple of compensatory damages to be awarded to an entire class of plaintiffs. Normally, either jurors would receive individualized evidence for each plaintiff or the plaintiffs would be so similar that the evidence presented for each would be virtually identical.<sup>53</sup> In most personal injury cases, however, the mechanics of causation and the extent of damages tend to vary considerably from plaintiff to plaintiff.

Judge Parker decided to appoint a special master, the author of this Article, to gather relevant information concerning each member of the class. By this process, the jury could benefit from both an individualized and a collective view of class members (1) for analyzing the proportionality of any award of punitive damages; and (2) for appreciating the typicality of the named representative class plaintiffs.<sup>54</sup> The special master decided that the most effective approach would be to seek the cooperation of the parties and view the entire project as a joint venture. Rather than making this solely a court process, the parties' participation would both reduce cost and add to the legitimacy of the project.

The special master commenced negotiations with the parties to devise a data collection protocol. Experts hired by the special master began the

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<sup>53</sup> *Jenkins*, 109 F.R.D. at 272.

<sup>54</sup> *Id.*

process by composing a proposed list of critical asbestos disease case variables. Once the parties agreed on the appropriate information to be collected, negotiations began on a format for collecting that information. The court's experts then designed a data collection instrument. Eventually everyone agreed on two virtually identical protocols—one to be completed by the plaintiffs and one by the defendants—containing 109 questions requesting 512 separate pieces of data.<sup>55</sup> Paralegals and attorneys for the parties, under the supervision of carefully screened public health professionals selected by the special master, completed their respective protocols. In addition, a team of neutral professionals spot-checked a percentage of the protocols to insure accuracy.

Once the data had been collected, it was entered into a central computer. A total of approximately 2.3 million items of information were gathered. The special master, in conjunction with neutral programmers, prepared a system of programming logic that organized the data into an aggregate compilation of information. Background information consisted of the class members' average age, sex, vital status, income, and alleged disease, as well as a distribution of these characteristics among the class plaintiffs. Asbestos disease data included dates of first exposure to asbestos, total years of exposure to asbestos, level of exposure to asbestos, employment, smoking history, knowledge of asbestos danger, use of protective devices, applicable statutes of limitations, and exposure to other substances. Finally, medical data concerning clinical symptoms, pulmonary function tests, radiographic findings, blood gas studies, pathology/biopsy results, type, cause, and origin of cancer, other diseases, and medical expenses was also compiled.<sup>56</sup> The special master and experts prepared a computer program that would display this information for each individual plaintiff. The special master also prepared a slide series that displayed the characteristics of the class members. In addition, he made a video tape of the proposed presentation for the jury.<sup>57</sup>

Judge Parker contemplated two separate presentations to the jury by the special master. First, the special master would present introductory evidence concerning the general characteristics of the plaintiffs, accompanied by a preview of their more detailed asbestos exposure and medical history. Second, following testimony by plaintiffs and defendants concerning liability and general causation, the special master would offer further evidence on

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<sup>55</sup> Many of the data collection techniques used for streamlining the Texas asbestos litigation were developed by professors McGovern and Green in resolving the Ohio Asbestos Litigation. See Brazil, *Special Masters in Complex Cases, Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 399-402 (1986) (briefly describing the computerized data collection process).

<sup>56</sup> *Jenkins*, 109 F.R.D. at 289.

<sup>57</sup> See *Jenkins*, 782 F.2d at 471 (approving of the special master's method of presenting information to the jury).

exposure and medical data. Once the parties saw the programming logic, data, slides, and video tape, they agreed to present the information to the jury with the special master available to answer questions.<sup>58</sup> The data collection process was begun on December 23 and ended with the presentation at trial on March 12—a period of less than three months.

#### D. Results

*Jenkins v. Raymark* was tried for twenty days. The trial commenced with the special master's presentation of the vital statistics of the class members and with a preview of data to be presented after the jury had heard evidence concerning exposure and medical aspects of asbestos related diseases. The plaintiffs called thirteen witnesses, but before the defendants presented their case, the parties settled for a total of \$137 million—\$107 million in new money to be paid over three years and \$30 million from earlier partial settlements.<sup>59</sup> The settlement allocated a separate amount of money to each plaintiffs' attorney and provided that the attorney, subject to review by the court, would allocate the money among his clients. The judge examined the award to each class member, reviewed the awards in light of composite and individual data, and then made several changes. The average value of the class action cases was twenty-five percent lower than the mean of prior settlement values.

The court also reduced the attorneys' fees by limiting the normal thirty to forty percent contingent fee contracts to no more than twenty percent. Lead counsel for the plaintiffs received one percent of the settlement for his role in the trial.

##### 1. Economy

The cost to the judicial system for the class action approach in both time and money was substantially less than what an equivalent number of individual trials would have generated, even taking into account the supplemental judicial resources devoted to appeals, pre-trial matters, and settlement negotiations. The cost to the parties, however, was greater than a trial with a smaller number of plaintiffs. In addition, the parties bore the expenses of the lead trial counsel and the special master. Yet if costs were pro-rated over the entire class, the per-plaintiff transaction costs were substantially less than for a similarly situated group of individual plaintiffs.

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<sup>58</sup> See T. WILLGING, *supra* note 9, at 63 n.148 (stating that if the parties had not settled, the computer data might have lent credibility to a plan that allowed a single jury to assess punitive damages for a class before compensatory damages were assessed for the class).

<sup>59</sup> See M. SELVIN & L. PICUS, *THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE* 3 n.6 (1987) (discussing the *Jenkins* class action settlement agreement). See generally *Annual Judicial Conference Second*

Though opportunity costs were negligible, potential error costs remained considerable. The defendants vigorously argued that a jury was incapable of making error-free decisions when confronted with such a staggering amount of complex information; the decision-making process was simply unworkable. Jurors would average, anchor, or utilize emotional techniques to help them cope with an otherwise unintelligible mass of data. The plaintiffs, however, contended that asking the jury to look at the big picture—all relevant asbestos products over a large period of time in the context of determining who knew what and when—would improve overall accuracy and consistency.

The special master's presentation concerning the members of the class alleviated some of these concerns, particularly in regard to punitive damages. Rather than answering questions concerning individual plaintiffs, the jury could focus on the group as a whole. They could be wrong in any specific instance but, as long as their aggregate analysis was correct, their overall error rate would be low. The data was also effective in the attorneys' and judge's allocation of monies among the plaintiffs.

## 2. Fairness

The defendants protested that the entire process failed on grounds of predictability, rationality, and equality of opportunity and strategy. A number of plaintiffs' attorneys agreed but, since they decided to opt out of the class, their arguments went unheard.

Notwithstanding the guidelines in the Federal Rules of Civil Procedure, Rule 23 had never before been used in the context of a mass tort trial prior to *Jenkins*.<sup>60</sup> The defendants viewed the class action as leading inexorably to an unfavorable financial result. Instead of resolving the 753 cases individually over a several-year period, the claims would all be paid at once. Many of them would be paid long before resolution of similarly situated claims in other jurisdictions.

If these cases had proceeded to trial, a jury might have denied liability or

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*Judicial Circuit of the United States, Innovative Techniques for Resolving Complex Litigation*, 115 F.R.D. 374, 390 (1986) (comments of panelist Sheila Birnbaum that the *Jenkins* case was settled for over \$100 million and briefly describing the process set up for the distribution of the settlement fund).

<sup>60</sup> While class certification of asbestos claims was sought early in the overall asbestos litigation process, it was consistently denied. *See, e.g.*, *Yandle v. PPG Indus.*, 65 F.R.D. 566 (E.D. Tex. 1974); *Austin v. Johns-Manville Prods. Co.*, No. 76-735 (D.N.J. 1977). *See also* J. FLEMING, *THE AMERICAN TORT PROCESS* 240-41 (1988) (stating that mass tort claims, such as asbestos disease claims, generally do not qualify for Rule 23 classification "because claims for damages, unlike injunctions in antitrust cases and the like are predicated upon the unique features of each individual case").

punitive damages, but the consensus among attorneys for both sides was that a \$300 million punitive damage award was probable. The defendants felt that they simply could not take that risk, even with prospects for a favorable appeal. A single \$300 million award would also have severely damaged the Asbestos Claims Facility.

The plaintiffs' attorneys representing the class reacted differently. They felt certain that the East Texas courts would not devote a disproportionate amount of trial time to asbestos cases. They feared they would face tremendous delays like those burdening the dockets in Philadelphia or Boston.<sup>61</sup> This overwhelming delay shifts bargaining power from plaintiffs to defendants; defendants have practically unilateral power to settle prior to trial. When plaintiffs' attorneys realize that they will not get full trial value for many years, they discount their cases to present value, and settlement becomes more appealing. The net effect of such tremendous court delay may be a more rapid resolution of cases, but at a substantially lower value.

Faced with this alternative, the weaknesses the plaintiffs' attorneys saw in the class action approach seemed almost trivial. They did, however, dislike the single roll-of-the-dice verdict, judicial control over attorney's fees, and the elimination of liability and punitive damages from individual trials. They worried that, if the cases did not settle, subsequent trials on individual causation and damages would result in lower verdicts; the "heat" generated by the defendants' documents, testimony, and trial strategy would no longer be available to stimulate a large jury award.

The Illinois State Court used the same type of opt-out class action for punitive damages in *In re Salmonella Litigation*,<sup>62</sup> the salmonella milk mass tort in Chicago, with substantially different results. The defendants conceded liability, and the only issues submitted to the jury were whether defendants acted willfully or wantonly and what an appropriate single payment of punitive damages would be.<sup>63</sup> The court did not utilize a special master's report. The defendants appealed the class certification, dropped their appeal during trial, and received a defense verdict from the jury.<sup>64</sup>

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<sup>61</sup> See, e.g., D. HENSLER, *supra* note 12, at 84-85 (noting that from 1983 to 1985, no asbestos cases were terminated in the Massachusetts federal courts and that at current disposition rates, the Pennsylvania state courts in Philadelphia will not dispose of all their cases for decades).

<sup>62</sup> Master File No. 85 L 000000 (Ill. Cir. Ct. Aug. 1, 1985) (order certifying class action). See also Frank, *Mass Torts, Salmonella Cases: A Model?*, 71 A.B.A. J. 5, 19 (1985) (discussing pre-trial consolidation of salmonella tort cases for discovery purposes).

<sup>63</sup> *In re Salmonella Litig.*, No. 85 L 000000 (Ill. Cir. Ct. Nov. 3, 1986) (stipulation by defendant concerning compensatory liability) (cited in Marcus, *Apocalypse Now?* (Book Review), 85 MICH. L. REV. 1267, 1289 (1987)).

<sup>64</sup> After deliberating ten weeks on the punitive damages issue, the jury found for the defendants on the basis that there was no justification for a punitive award. See

The special master's report in *Jenkins* was opposed by defendants because it seemed to advocate the use of the class action device. Both plaintiffs and defendants were skeptical of the report's value and cost effectiveness. Once completed, however, the data presented by the special master seemed to support each side's interests sufficiently to warrant its use. In general, the report suggested that the parties had little factual disagreement. The data revealed that plaintiffs and defendants had similar information on the fundamental characteristics of the plaintiffs' cases—items such as age, family history, income, asbestos exposure, and smoking history. They differed, however, on the legal and factual implications of this shared information.

Significant variances also existed in the parties' medical data. For example, the defendants' medical experts had generally found that many plaintiffs suffered only from pleural plaques or thickening of pulmonary membranes through their analysis of radiographic evidence. Plaintiffs' doctors, however, often found interstitial fibrosis, a much more serious and advanced condition, from similar evidence.

On balance, the data revealed that the members of the class were very similar in their work and personal histories. The report provided, however, sufficient strengths and weaknesses to afford each side ample opportunity for argument. In particular, the defendants relished the opportunity to portray plaintiffs presented to the jury as representative of the class, as not "representative" at all.

Once the case was settled, the data provided an opportunity to evaluate any perceived unfairness of a group settlement. Because extensive information concerning individual plaintiffs already existed, the court could review each plaintiff's case and insure that the allocation of awards was equitable. In addition, the court could determine the adequacy of the overall settlement amount.

### 3. Other Values

Plaintiffs' attorneys were interested in resolving their cases at full value and remained confident that the class action would result in either a favorable verdict or settlement. They were willing, therefore, to sacrifice a degree of individual autonomy, dignity, participation, and control in order to facilitate the mass resolution of their cases. Moreover, the relatively small number of plaintiffs' attorneys involved in the class action preserved a respectable level of individual control. In fact, the settlement allocated separate lump sums of money to each attorney for their respective clients.

Plaintiffs' attorneys who opted out of the class expressed more strenuous objections. They felt that control over their clients' fate as well as trial participation would have been seriously diluted by lead plaintiffs' counsel.

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Marcus, *supra* note 63, at 1289 n.66 (citing *Jury Rules Stores Not Negligent in Poisoning*, N.Y. Times, Jan. 24, 1987, at 8, col. 3).



They also perceived the risks associated with the class action somewhat differently. Although East Texas might be an acceptable forum for plaintiffs, results from other parts of the country indicated that a class action vehicle might prove less favorable.

A vigorous debate arose over whether the class action approach was consistent with the policies underlying the substantive tort law. The defendants contended that an award of punitive damages could not be determined without reference to each plaintiff and each plaintiff's compensatory damages. The United States Court of Appeals for the Fifth Circuit held that the purpose of punitive damages under Texas law was "to create deterrence and to protect the public's interest."<sup>65</sup> Because the jury would be asked to focus on the defendant's conduct, a concurrent decision on punitive damages and compensatory damages was not required. It was necessary, however, for the court to insure a reasonable proportionality between compensatory and punitive awards. Arguably, the jury's award would be a more precise deterrent because it would be founded on a broader based information matrix than would normally be available in single plaintiff trials.

## II. DALKON SHIELD: ARE MASS TORT BANKRUPTCIES BANKRUPT?

### A. Problem

On August 21, 1985, the A.H. Robins Company filed for bankruptcy. Prior to filing, Robins had been sued by approximately 16,000 plaintiffs because of alleged defects in its Dalkon Shield intrauterine device.<sup>66</sup> Almost 9,500 cases had been settled for approximately \$530 million;<sup>67</sup> sixty cases had been tried

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<sup>65</sup> *Jenkins*, 782 F.2d at 474 (quoting *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1378 (5th Cir. 1982), that "the purpose of punitive damages is not to compensate those who have felt the loss, but . . . instead to create a deterrence to the wrongdoer" and *Bank of North America v. Bell*, 493 S.W.2d 633, 636 (Tex. Civ. App. 14 Dist. 1973) for the proposition that exemplary damages deter both the defendant and others, thereby "protecting the public interest").

<sup>66</sup> As of June 30, 1985, the total number of cases was 14,330, and new claims were being filed at a rate of 15 per day. M. MINTZ, *AT ANY COST* 7 (1985). See also Schwadel, *Robins and Plaintiffs Face Uncertain Future*, *Wall St. J.*, Aug. 23, 1985, at 4, col. 1 (stating that more than 13,000 women had brought suit against A.H. Robins for Dalkon Shield related injuries).

<sup>67</sup> *In re A.H. Robins Co.*, 88 Bankr. 742, 743 (E.D. Va. 1988). See also Couric, *The A.H. Robins Saga*, 72 A.B.A. J. 56, 56 (1986) (stating that Robins and its insurer had paid \$530 million by the time of its bankruptcy filing on Aug. 21, 1985). Cf. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir. 1986) (citing Nat'l L.J., March 17, 1986, at 10, which declared that Robins and its insurer, Aetna Casualty and Surety Company, had paid \$517 million for judgments and settlements by mid 1985); Note, *Bankruptcy, Waste and Mass Tort*, 23 HOUS. L. REV. 1243, 1244 n.12 (1986) (citing

to a jury verdict with the plaintiffs winning thirty-three and Robins winning twenty-seven;<sup>68</sup> and 7,000 lawsuits were still pending in August of 1985.<sup>69</sup> Among the jury awards were two large judgments for punitive damages—one for \$7.6 million and one for \$6.2 million.<sup>70</sup>

After filing under Chapter 11, Robins attempted to establish a bar date for plaintiffs to file new claims. At a minimum, Robins wanted all claimants who had filed lawsuits or whose causes of action had accrued prior to the bar date to file a claim in the bankruptcy court or forfeit their claims. Robins also wanted a bar date for all unaccrued causes of action against the debtor—all persons in the future who might eventually have actions for personal injuries associated with the use of the Dalkon Shield. In addition, Robins desired to establish a close-ended fund to compensate those claimants who had not been barred. All liabilities from Dalkon Shield related claims would rest with a trust fund while the company could proceed unencumbered in its normal business operations. Bankruptcy would thus create "global peace" except for actions against the trust fund.

When the case was filed in Richmond, Virginia, where the headquarters of Robins was located, it was automatically referred to U.S. Bankruptcy Judge

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Schwadel, *Robins Files for Protection of Chapter 11*, Wall St. J., Aug. 22, 1985, at 3, col. 1, which asserted that as of June 30, 1985, Robins had paid approximately \$378 million to Dalkon Shield victims).

<sup>68</sup> See *Piccinin*, 788 F.2d at 996 n.4 (citing Nat'l L.J., March 17, 1986, at 10, which provided that by mid 1985, there had been 9,300 settlements and twenty-five trial judgments); Note, *supra* note 67, at 1244 n.12 (citing Wall St. J., Aug. 22, 1985, at 3, col. 1., which stated that as of June 30, 1985, approximately 9,230 cases had been settled); Couric, *supra* note 67, at 56 (repeating that about 9,450 cases had been settled or tried by Aug. 21, 1985); S. ENGELMAYER & R. WAGMAN, LORD'S JUSTICE 81 (1985) [hereinafter S. ENGELMAYER] (declaring that of the approximately 7,500 Dalkon Shield cases settled from 1972 to 1985, fewer than forty went to a jury). By the end of 1984, Robins had won about half of the cases which had gone to trial. Page, *Asbestos and Dalkon Shield: Corporate America on Trial*, 85 MICH. L. REV. 1324, 1327 n.16 (1987) (citing Middleton, *Robins Mounts Drive to Settle Dalkon Suits*, Nat'l L.J., Dec. 24, 1984, at 1, col. 3). See also Schwadel, *Robins Takes 2nd Quarter Charge, Sees Chapter 11 as Option on Dalkon Costs*, Wall St. J., July 25, 1985, at 3, col. 2 (reporting that as of 1985, Robins had lost thirty-two of the fifty-nine Dalkon Shield cases that had gone to trial).

<sup>69</sup> See *Piccinin*, 788 F.2d at 996; *In re A.H. Robins Co.*, 59 Bankr. 99, 101 (E.D. Va. 1986). See also Note, *The Fourth Circuit Review: Robins v. Piccinin: The Fourth Circuit's Response to Bankruptcy and Mass Tort*, 44 WASH. & LEE L. REV. 537, 540 (1987). Cf. Couric, *supra* note 67, at 56 (stating that by the time of the bankruptcy filing, Robins still faced 6,000 pending cases).

<sup>70</sup> On May 3, 1985, a Kansas jury awarded Loretta Tetuan \$9.2 million for her Dalkon Shield injuries—\$7.5 million of this award was for punitive damages. See *Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987). On June 4, 1984, the Colorado Supreme Court upheld the jury's award of \$6.2 million in punitive damages to Carie M. Palmer. See *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984).

Blackwell N. Shelley. Upon motion by Robins, U.S. District Judge Robert R. Merhige, Jr., entered an order retaining the non-core portions of the proceedings.<sup>71</sup> On November 21, 1985, Judge Merhige approved Robins's motion to establish a bar date and its proposal to spend \$4.5 million advertising to all present and future claimants that they must file a claim in the bankruptcy court by April 30, 1986.<sup>72</sup> By March of 1986, it became obvious that the bar date had created a new problem for the debtor: instead of an anticipated 30,000-50,000 claims, the advertising campaign was generating filings at a rate that would eventually total 300,000 claims from over one hundred countries.

In an effort to obtain more information concerning the claims, the court sent a two-page questionnaire to each claimant requesting certain basic information: name, address, nature of injury, and details of Dalkon Shield use. The parties had estimated that up to one-third of the claims were duplicates, made in error, or involved no injuries. The court questionnaire was designed to give Robins an opportunity to object to any claim that was facially invalid and eliminate the claims of those who failed to return the questionnaire. Even with that fallout, approximately 200,000 claimants remained, about 193,000 of whom had never entered the tort system during the fifteen years of Dalkon Shield litigation.

#### B. *Diagnosis*

Chapter 11 of the Bankruptcy Code is premised upon negotiated solutions.<sup>73</sup> Typically, the parties are united by a common interest in maximizing

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<sup>71</sup> *In re A.H. Robins Co.*, 59 Bankr. at 105, Exhibit A (displaying Administrative Order No. 1, dated Aug. 21, 1985, Merhige, District Judge, which is an order withdrawing reference of case and proceedings, referring certain proceedings to bankruptcy judge and establishing additional administrative procedures).

<sup>72</sup> *Maressa v. A.H. Robins Co.*, 839 F.2d 220, 221 (4th Cir. 1988) (noting the April 30, 1986 deadline established by Judge Merhige); *In re A.H. Robins Co.*, 88 Bankr. at 745 (discussing "Bar Date Order" establishing April 30, 1986 as the deadline for filing claims against Robins and authorizing Robins to undertake an international campaign for notifying all unknown claimants of the Bar Date); Couric, *supra* note 67, at 59-60 (noting deadline established by Judge Merhige); M. MINTZ, *supra* note 66, at 6 (describing Robins's four million dollar advertising drive urging women to have the shields removed at Robins's expense).

<sup>73</sup> The parties are left to their own to negotiate a fair settlement. The question of whether creditors are entitled to the going concern or liquidation value of the business is impossible to answer. It is unrealistic to assume that the bill could or even should attempt to answer that question. Instead negotiation among the parties after full disclosure will govern how the value of the reorganizing company will be distributed among creditors and stockholders. H.R. REP. NO. 595, 95th Cong., 1st Sess., 221, 224 (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6183.

returns from a fixed asset base that diminishes over time. Each party owns a common resource and, since neither party can act unilaterally, the parties must agree on how to share that resource.<sup>74</sup> In the Robins case, however, the natural bargaining strengths of the parties were somewhat different. A management that highly valued the integrity of the company owned forty percent of the debtor. This management continued to run the company without significant interruption; profits and salaries increased, and prospects for future earnings were not significantly diminished even during bankruptcy.

Management seemed convinced that it would retain its statutory exclusive period for filing a plan of reorganization<sup>75</sup> even though it was under judicial pressure to file quickly. In particular, management was convinced that the total value of all Dalkon Shield related claims, except for punitive damages, would be a manageable amount. If it were possible to eliminate the threat of punitive damages, the company itself could provide more than sufficient funds for relief—a fund of \$800 million could be created by using company assets as collateral. Yet Robins insisted upon a close-ended fund—a single lump payment or a payment of a single amount over time—without any further recourse to the company. It was concerned that the extreme rancor pervading the Dalkon Shield litigation would follow Robins if it remained liable for an unlimited amount of damages.

The claimants' committee<sup>76</sup> was unsympathetic to management's concerns. The Bankruptcy Code provided that claimants must be paid in full before any money can be allocated to equity.<sup>77</sup> At historic settlement rates, the claimants' committee argued that billions of dollars in claims might arise against a company that had a much smaller estimated value. The committee argued for sale of the company, or at least an open-ended fund to pay all Dalkon Shield claims. Any remainder would go to equity. Further, the

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<sup>74</sup> Only when the parties are unable to agree on a proper distribution of the company does the bill establish a financial standard. If the debtor is unable to obtain the consents of all classes of creditors and stockholders, then the court may confirm the plan anyway on request of the plan's proponent, if the plan treats the nonconsenting classes fairly . . . .

*Id.*

<sup>75</sup> Under section 1121(b) of the Bankruptcy Code, the debtor typically has 120 to 180 days after the date of the order for relief under Title 11 before a reorganization plan must be filed. 11 U.S.C. § 1121(b) (1982 & Supp. II 1984).

<sup>76</sup> To ensure that creditors receive adequate representation during bankruptcy proceedings, courts will appoint a creditor's committee. 11 U.S.C. § 1102 (1982 & Supp. II 1984). A committee appointed under section 1102 has the power to "participate in the formation of a [reorganization] plan, advise those represented by such committee of such committee's determination as to any plan formulated, and collect and file with the court acceptances or rejections of a plan." 11 U.S.C. § 1103(c)(3) (1982 & Supp. II 1984).

<sup>77</sup> See 11 U.S.C. § 507 (1982 & Supp. II 1984) (priorities), § 510 (1982 & Supp. II 1984) (subordination), and § 726 (1982 & Supp. IV 1986) (distribution).

committee argued that the claimants should not bear the risk of an inadequate fund once the shareholders had received payment for their stock in the company. In addition, the claimants' committee could, under the Bankruptcy Code, move for the appointment of a trustee<sup>78</sup> or for the termination of the debtor's exclusive period for filing a reorganization plan.<sup>79</sup>

No one was optimistic about the chances for an early settlement. If the debtor attempted a reorganization plan without the participation of the claimants' committee and failed to garner the requisite number of claimant votes, practical termination of the exclusive period could result, and creditors could proceed with virtually any plan they desired. On the other hand, if the debtor succeeded on a claimant vote, the claimants' committee would have functionally diluted their role in the development of a reorganization plan.

There were two ways to view the negotiations: the parties could either look to the total value of the company and divide the pie or they could decide the total value of the claims and set aside a payment fund. Although uncertainty in settlement negotiations can encourage parties to reach an agreement, the uncertainty here merely crippled negotiations. A multi-billion-dollar difference between management's estimates and the plaintiffs' alleged total value of the Dalkon Shield claims, coupled with over a one billion dollar difference in estimates of the total value of the company, prevented negotiations from progressing past the preliminary stages.

Ill will among the parties also inhibited settlement negotiations. Not only had Dalkon Shield litigation created animosities in its fifteen year history,<sup>80</sup> but a cultural chasm separated bankruptcy lawyers from tort lawyers. In addition, Robins had fired its initial bankruptcy lawyers, the judge had fired the claimants' committee, and the plaintiffs' lawyers had attempted to disqualify the judge. It was clear that a negotiated solution would be difficult to reach.

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<sup>78</sup> 11 U.S.C. § 1103(c) (1982 & Supp. II 1984) (listing the powers and duties of committees).

<sup>79</sup> Section 1121(d) provides that "on the request of a party in interest made within the respective periods specified in subsection (b) and (c) of this section and after notice and a hearing, the court may for cause reduce . . . the 120-day period or the 180-day period referred to in this section." 11 U.S.C. § 1121(d) (1982 & Supp. IV 1986). *See also* Matter of Texas Extrusion Corp., 844 F.2d 1142, 1160-61 (5th Cir. 1988) (reducing for "good cause," debtor's 120-day period to one day).

<sup>80</sup> *See, e.g.,* S. PERRY & J. DAWSON, NIGHTMARE: WOMEN AND THE DALKON SHIELD 194 (1985) (noting the tactic of Robins's attorneys to ask women "dirty questions" on their past sexual behavior); M. MINTZ, *supra* note 66, at 194-203 (commenting on the antagonistic tactics used by Robins's attorneys to discourage women from bringing suit); S. ENGELMAYER, *supra* note 68, at 97 (noting bad faith delaying tactics).

### C. Prescription

Judge Merhige took a two-pronged approach. In August, 1986, he appointed an examiner, former U.S. Bankruptcy Judge Ralph R. Mabey, to facilitate negotiations by increasing the total value of the company. In March, 1986, Judge Merhige named a court appointed expert, the author of this Article, to devise a system for estimating the total value of the Dalkon Shield related claims. If the examiner could reduce uncertainty concerning Robins's value by increasing its total worth in the marketplace, and the court appointed expert could accurately estimate the range of value of the claims, a consensual plan might prove more accessible. The theory was to create an artificial negotiation deadline that would act as a surrogate for the normally successful negotiation incentive of a trial date.

The negotiations sponsored by the examiner partially succeeded in February of 1987. A potential purchaser offered to establish a \$1.75 billion cash fund for the claimants, pay \$100 million to trade creditors, and \$550 million in stock for equity. This offer was accepted by the claimants' committee after they had negotiated the fund up from \$1.5 billion to \$1.75 billion. Negotiations with Robins, however, stalled and the purchaser withdrew.

The debtor then developed a reorganization plan that offered trade creditors \$100 million and claimants a \$1.75 billion letter of credit to be paid over time. The claimants opposed the plan because the payment would not be in cash and because the company retained a reversionary interest in the fund. Yet another suitor offered to purchase the company with a \$1.75 billion fund for claimants to be paid over time, \$100 million for trade creditors, and approximately \$720 million for equity holders. The claimants also opposed this plan because they contended it was inferior to the proposal made in February, 1987.

On July 27, 1987, Judge Merhige scheduled a hearing to estimate the total value of the Dalkon Shield related claims in accordance with Section 502(c) of the Bankruptcy Code.<sup>81</sup> His goal remained encouraging a consensual plan that would expedite Dalkon Shield claims resolution as well as "global peace" for the debtor.

#### 1. Parties

There were six major players: the company, the trade creditors, the equity committee, claimants, future claimants, and the company's insurer. The

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<sup>81</sup> The Bankruptcy Code provides:

(c) There shall be estimated for purpose of allowance under this section—

(1) any contingent or unliquidated claim, fixing or liquidation of which, as the case may be, would unduly delay the closing of the case; or

(2) any right to an equitable remedy for breach of performance if such breach gives rise to a right of payment.

11 U.S.C. § 502(c) (1982 & Supp. IV 1986).

Robins family members acted through counsel for the debtor and had their own separate bankruptcy counsel. The equity committee represented the non-Robins family shareholders; their goal was to maximize stock value. The trade creditors were primarily interested in swift claims resolution. The sooner they received their funds, the more they would have in their pockets.

The situation concerning the claimants and future claimants was more complex. For instance, the U.S. Trustee originally appointed a claimants' committee of thirty-eight plaintiffs' attorneys with Dalkon Shield experience. Radical differences in tactics and strategy among the tort lawyers and between the tort and bankruptcy lawyers sometimes became so acute that communications ground to a standstill. Eventually, Judge Merhige disbanded the committee and replaced it with one that consisted of three claimants and one attorney. The legal representative for the future claimants worked closely with the claimants' committee, but his interests diverged when the rights of present and future claimants conflicted.

Another interested party was Aetna Life and Casualty Company, Robins's insurer. Although the insurer-insured relationship between Robins and Aetna had been terminated in 1977, Aetna remained a major trade creditor because of Dalkon Shield related damage awards and settlement funds it had advanced to Robins. In addition, Aetna had been sued as a joint tortfeasor with Robins for failing to remedy the problems associated with the use of the Dalkon Shield. Judge Merhige consolidated all of those cases in his court.

## 2. Issues

The first issue confronting the court concerned its powers under Section 502(c) of the Bankruptcy Code. It is not uncommon for courts to estimate the value of claims for voting purposes.<sup>82</sup> Nor is it unusual for them to estimate a single claim to provide full information for a disclosure statement. Here, Robins was asking the court to estimate the total value of 200,000 still viable individual claims that had been filed, plus an unknown number of future claims, and to use that estimated number to set a cap on the total award Robins would owe all Dalkon Shield claimants.

In theory, the estimation hearing was intended to provide sufficient information to the parties so that they could negotiate a consensual plan. In fact, the impending release of raw and unanalyzed data for the estimation necessitated a substantial negotiation effort. If negotiations proved unsuccessful, the court could rule, at least for purposes of a disclosure statement, on the total value of the claims.<sup>83</sup> If the parties still could not reach a settlement, the court could then limit Robins's Dalkon Shield liability to that value.

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<sup>82</sup> See, e.g., *In re Solar King Corp.*, 90 Bankr. 808, 827 n.36 (1988); *In re Trans-American Natural Gas Corp.*, 79 Bankr. 663, 664 (1987); *Matter of Poole Funeral Chapel, Inc.*, 79 Bankr. 37, 38 n.4 (1987).

<sup>83</sup> See *supra* note 74.

The court faced two issues in its estimation process: (1) what was the appropriate amount of money for the fund? and (2) how would it be distributed? A 502(c) estimation had never been conducted in a mass tort action, so little precedent existed in law or in practice. The method of distributing the fund proved just as important as the amount placed in it; until the parties had a good perspective on the general rules for payment, an estimated value of the claims would remain impossible. Judge Merhige asked his court-appointed expert, with the concurrence of the examiner, to serve as a mediator with the parties in devising a claims resolution facility and if necessary, to make recommendations to the court when there were differences among the parties.

This claims resolution facility, eventually included in Robins's proposed disclosure statement, offered four options for claimants: (1) a relatively small flat payment upon an affirmation of Dalkon Shield use and injury; (2) a schedule of benefits for specific injuries for claimants who could provide documentary evidence of use and injury; (3) a deferral option for those who later decided to make a claim; and (4) a procedure to proceed through a series of offers and demands culminating in settlement, binding arbitration, or trial. With the exception of the elimination of punitive damages, the applicable law and venue was as if the cases had never been in bankruptcy.

The theory behind the claims resolution facility was that there was no single "best" remedy for all the claimants. For those who had minor damages or who were unable to prove a Dalkon Shield related injury, the flat payment of option one was optimal. Plaintiffs who had substantial proof of injuries could elect the scheduled payment in option two, rather than the more intense process required by option three. Those who felt they deserved higher awards and individualized treatment could choose the more traditional litigation process in the final option. The more compensation sought by a claimant, the more information the fund required.

These options recognized that claimants are in the best position to make these individual process selections. At the same time, the fund would not expend precious resources conducting a full and complete investigation in every case, regardless of its worth. The design of the facility resembled a manufacturer's attempt to capture consumer surplus through price discrimination. The fund was "selling" its "product"—the resolution of Dalkon Shield cases—by having "purchasers" self-select the optimal combination of price and transaction costs.

### 3. Information

To resolve the specifics of the 200,000 pending claims, the court-appointed expert decided to utilize an analytic approach he had developed in the Ohio Asbestos Litigation with Professor Eric D. Green.<sup>84</sup> Approximately 9,500

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<sup>84</sup> See *supra* note 55.



previous cases provided data on key variables essential to the outcomes and values of Dalkon Shield claims. The 200,000 pending cases also afforded information concerning these same variables. Using historical experience, one could extrapolate the total value of the pending claims based upon previous case values.

The first issue arose over data collection. Due to the controversial nature of the estimation process, and because the court had not yet mandated a Section 502(c) estimation, each party had its own experts to assemble data. The entire process would thus be consensual—experts from all parties would collaborate with court-appointed neutrals and subcontractors to develop a common data base. If all parties agreed on the data base, then each side could use its own methodology to analyze the data and make its own estimation.

The next concern was whether the parties, now accustomed to acrimonious discourse, could possibly agree on each step in the claims estimation process. Following a long series of negotiations, the experts agreed on virtually every aspect of the data collection. During the estimation hearing, not a single complaint was raised regarding the data base; during the entire process only three issues were raised before Judge Merhige.

The experts agreed upon two data collection instruments—one for previously resolved cases and one for pending claims. The previously resolved case questionnaire consisted of 150 questions culled from the range of relevant variables. The statisticians decided that the questionnaire would be used for a random sample of 1,600 of the 9,500 cases and a stratified sample of the 100 highest and 100 lowest cases. Neutrals hired specifically for this purpose gathered complaints, interrogatories, depositions, and medical records from the files of Robins, its attorneys, its insurance carrier, and plaintiffs' attorneys. Once the files were re-created, neutral medical personnel completed the questionnaire and translated the information into an international language for the coding of diseases, treatments, and tests—a format known as the ICD-9. Neutral computer personnel then entered the information onto computer tapes to facilitate analysis.

The experts realized that the task of reaching a consensus on a corresponding questionnaire for the pending cases would be far more difficult. Preliminary data showed that fewer than one-fourth of the claimants were represented by attorneys, so the form had to be comprehensible to all potential lay plaintiffs. On the other hand, a significant amount of information was required to verify the details of each claim. The experts, therefore, decided to send a fifty-page claim form to 6,000 claimants. Following drafting and approval, the claim form was pre-tested on claimants from a variety of socio-economic groups to determine if they could understand the questions and respond completely and accurately.

The final design of the claim form accomplished two goals: it gathered information on certain specifics of a claimant's personal history, and it identified the essential facts of a claimant's OB/GYN medical history so that

medical records could then be obtained. The claim form consisted of eleven sections: background information; use of Dalkon Shield; medical history; pregnancies; contraception; medical problems, illnesses, or injury claims from the Dalkon Shield; other medical information; claims of future medical problems; financial losses; certification; and optional additional comments. Partially because it was product of intense negotiations the form contained imperfections. For example, Robins favored open-ended questions concerning a claimants' allegations of harm, since choosing from a list of potential harms might prompt erroneous responses. On the other hand, the claimants' committee favored a checklist that claimants could readily mark. The compromise claim form contained a checklist in the section on medical history, and two sections later, open-ended questions regarding medical problems, illnesses, or injury claims from the Dalkon Shield.

Once a claimant completed and returned the claim form, she would be responsible for obtaining medical records verifying her Dalkon Shield use and describing any related injuries. Once received, neutrals hired by the court gathered all other relevant medical records. In addition, the parties established a toll-free telephone line to assist the sampled claimants. Because of concerns over interviewer bias, all responses made by the 800 number operators were limited to scripts approved by all the parties.

As the claim form and requested medical records were returned, neutrals logged them on a sophisticated data tracking system and entered the data directly into computers using programs specifically designed for that purpose. As in previously resolved cases, the medical records were coded into ICD-9 and entered onto computer tape.

The parties received the final tapes in July, 1987. Over 75 million pieces of information had been collected; the entire process had taken fourteen months. The materials prepared for the parties had two components, a tape of the raw data organized to facilitate analysis and a hard copy which translated the raw data from the master tape into a printout of a case summary for each sampled claimant. The printout organized the case summaries to approximate traditional Dalkon Shield case summaries. Thus, the parties had two formats for analyzing data—the tape, for computer manipulation of the information as a whole, and case summaries that could be reviewed individually by attorneys, physicians, nurses, or paralegals.

#### *D. Results*

Judge Merhige conducted an estimation hearing from November 5 through November 11, 1987. Fifteen witnesses testified; 212 exhibits were offered into evidence. Testimony concerning the total value of pending claims from the five experts who participated in the consensual data collection process varied from \$1.0 billion to \$7.3 billion, with the second highest estimate at \$2.5 billion. They used at least three distinct analytic techniques—regression analysis, decision tree analysis, and an expert system.

Although the absolute estimates diverged substantially, all the experts agreed on the role of the data base with the discrepancies in their testimony attributable to disagreements on five basic assumptions: (1) the effect of statutes of limitations; (2) the level of proof required to demonstrate Dalkon Shield use and injury; (3) the effect of alternative causes of injury; (4) the value of the previously resolved cases; and (5) the number of claimants who would pursue the various claims resolution facility options.

Of these five assumptions, the experts disagreed the most on the size of the claimant pool. Experts for Robins, for example, assumed that a relatively small number of claimants would qualify to receive historic settlement values. Robins's expert based his assumption on the number of claimants who returned a completed claim form, and sent in medical records that confirmed Dalkon Shield use and injuries, and demonstrated in the file a lack of obvious alternative causes for alleged Dalkon Shield related injuries. On the other hand, the expert for Aetna assumed a much larger number of eligible claimants. She focused on the total number of claimants who sent some portion of the claim form, alleged Dalkon Shield use and injury, and presented at least some, if not complete, medical records. The expert for the claimants took a different, and more expansive, approach. He assumed that all claimants would be eligible unless their claims form or medical records showed an absence of Dalkon Shield related injuries.

The basic differences among the parties became more acute as the hearing proceeded. At one point, Judge Merhige requested that certain assumptions be changed and estimates recalculated. By the conclusion of the hearing, however, it was reasonably clear that the remaining issues were well within the expertise of the court. Notwithstanding these efforts, subsequent settlement negotiations failed to resolve the differences between the parties. Therefore, on December 11, 1987, Judge Merhige announced that he would rule on the total value of the Dalkon Shield related-claims. His ruling set the estimated value of the claims at \$2.475 billion, to be paid over a reasonable length of time.

Within two weeks of the announcement, two additional parties offered to purchase the company. Robins decided to sell after it became evident that its stand-alone purchase plan could not be self-financed. The company proposed a sale of fifty-eight percent of the stock for \$600 million, with a \$2.475 billion letter of credit to be paid over five years, and \$100 million to trade creditors. The claimants' and equity committees, on the other hand, preferred a sale involving 100 percent of the stock for \$700 million, a \$2.34 billion cash payment at consummation for claimants, \$100 million to trade creditors, and a settlement of the plaintiffs' independent tort action against Aetna.

After extensive negotiations, the parties accepted the latter offer in March of 1988. The final plan also included provisions that relaxed the bar date originally requested by Robins. Future claimants could receive compensation, but only if their medical problems were manifested after the bar date, or

they lacked knowledge of the bar date. Under the amended bar date, late filing claimants would be subordinated to timely claimants but would be compensated if sufficient funds still remained.

### 1. Economy

When completed, the estimation process represented the largest and most expensive social science survey ever conducted under the auspices of a court. The data collection process itself cost approximately \$5 million. The study cost represented 0.2% of the \$2.475 billion in dispute and 0.7% of the change in the value of the claimants' fund.<sup>85</sup> The parties also incurred expenses in both monitoring the process and in presenting evidence at the estimation hearing. Total expenses for the data collection process could probably have been reduced by half, however, if the court-appointed experts, rather than all the parties, had conducted the process.

The cost of the study can be justified on two grounds independent of the estimation: (1) for the benefit of the trustees of the claims resolution facility in designing their processes; and (2) for scientists studying the medical phenomena associated with IUD use. In addition, in any future litigation, a substantial cost reduction can be realized by using the process as a model.

Despite these benefits, the opportunity costs associated with the estimation process may have been significant. For example, it could be argued that, absent the estimation process, the case might have settled much earlier and at lower cost. Had the parties known that no additional information concerning the value of the pending claims would be forthcoming, they might have become reconciled to a high level of uncertainty, and thus resolved the case earlier. Most of the parties believed that they required some sort of estimation based upon gross data; it did not seem feasible to have extensive formal discovery in 200,000 cases before the resolution of the bankruptcy. Moreover, while the estimation might have been much less sophisticated and expensive or relied on more hypothesis than data, successful case resolution required a greater degree of certainty.

The most troublesome costs of the estimation process related to potential errors. Only time will determine the accuracy of the process, although estimates can often become self-fulfilling prophecies. Given the painstaking and costly checks made on the underlying data, the experts all agreed on the level of accuracy of the data base. Yet, a comparison to the information gathered following exhaustive discovery under the Federal Rules of Civil Procedure in a typical Dalkon Shield case would necessarily render the study second best. In addition, the nature of the evidence—purely statistical—may have its own problems. There is a bona fide doubt by some decision-makers of making a ruling based on anything other than detailed

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<sup>85</sup> *In re A.H. Robins Co.*, 88 Bankr. at 747 (noting that the necessary fund was \$2.475 billion, as a result of the estimation process).

and individualized facts. That is one reason why the parties received both raw data tapes and individualized case summaries.

## 2. Fairness

The fairness criteria constitute both the greatest strengths and weaknesses of the process. On one hand, genuine equal opportunity and strategy existed among the parties. On the other hand, the exigencies of the project did not permit a high level of predictability concerning the rules of the study. In addition, continuous doubt remained whether the court would allow the project to be completed and, if so, how it would be used by the court. Nevertheless, the transparent nature of the process, as well as the continuous interaction among the parties, helped allay these fears. The court-appointed expert worked carefully with the parties during each step of the process, thereby insuring that each decision received a full opportunity for input from all sides.

Views of the rationality of the study varied but the close agreement among the experts suggests that the data base was reliable. Therefore, despite the lack of an official ruling or opinion, the fact that the parties all agreed to the final estimate suggests their approval of both its rationality and its fairness.

## 3. Other Values

The reaction to other, less tangible, values varied among the attorneys and their clients. The attorneys, for example, generally noted a strong sense of participation, full information, and significant control in the process. The attorneys did not consider values such as dignity and autonomy as important.

The claimants' level of participation was extraordinary. Of a potential 300,000 claimants, sixty-six percent returned the court's two-page questionnaire. In addition, sixty-six percent of the 6,000 survey claimants indicated a desire to pursue their claims by returning at least one document. Sixty-five percent of the sampled survey claimants from the group of 200,000 viable claims returned the fifty-page claim form. Indeed, claimants seemed to relish the opportunity to tell their own stories without the indignities often suffered in the formal litigation discovery process. Minimal assistance from the toll-free telephone number for legal and medical advice as well as by the inability to locate the appropriate medical records, however, generally frustrated them.

A desire to protect the privacy value of each claimants' file resulted in high levels of confidentiality. The court neutrals went so far as to enclose all communications with claimants in envelopes to prevent even casual revelations to third parties. In addition, the parties limited the public exposure of the data base only to the estimation hearing.

The degree to which the process furthered the underlying values of the substantive tort and bankruptcy law is not as clear. If \$2.475 billion is the

"true value" of the eventually liquidated claims, then the results would be superb. If not, at least one of the parties will have been shortchanged. Yet, the lack of viable alternatives and the parties acceptance of the estimate offered by the court indicates that these values were served.

### III. RESOLVING MATURE MASS TORTS

Typically, the consolidation of less than ten cases—for discovery or trial—is an extremely effective tool in resolving disputes. When confronted by larger numbers, judges are generally more reluctant to consolidate. As illustrated by the East Texas and Dalkon Shield cases, consolidating large numbers of mature mass tort cases into a single forum can be a practical and successful procedure for resolving disputes. In particular, consolidation can assist in deciding common issues such as liability, general causation, and punitive damages and even more individualized issues such as specific causation and aggregate compensatory damages. In addition, the case studies provide an opportunity to benefit from feedback loops, thereby improving future dispute resolution.

Once past the hurdle of practicality, the question then becomes whether mature mass tort cases should be consolidated and, if so, how. Unlike most torts where not every individual harmed seeks legal redress, mature mass torts generate an overabundance of plaintiffs through widespread publicity, including a substantial number of false positive claims. The defendants, who usually have withdrawn their products or corrected deficiencies prior to litigation, face substantial costs in internalizing compensatory damages, punitive damages, and defense transaction costs. Given the potentially large number of plaintiffs, deterrence could easily become overdeterrence and retribution become crippling.<sup>86</sup> This situation is compounded where, as in the two case studies, there may not be sufficient funds for equitable plaintiff compensation. This potentially disastrous scenario demands a different approach.

One view is that the current system is "not broken" and thus should not be "fixed."<sup>87</sup> A second position is that slowing down mass tort case resolu-

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<sup>86</sup> See Sales & Cole, *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1155 (1984). But see M. PETERSON, S. SARMA & M. SHANLEY, *PUNITIVE DAMAGES: EMPIRICAL FINDINGS* 56 (1987) (noting that in Chicago and California, from 1980 to 1984, nine out of ten punitive damage awards in excess of \$500,000 were subsequently reduced).

<sup>87</sup> See, e.g., W. BECKHAM, B. BORISH, P. CORBOY, D. HASKELL, W. LUNQUIST, R. SUHRHEINRICH & G. BELL, *TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW* 11-60 to 11-63 (1984) (supporting the current system but stating that modifications may be required) (cited in Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 968 n.11 (1988)). See also

tion is a positive development. Once plaintiffs' attorneys recognize that their cases will not be resolved quickly, then they will be eager to enter settlements at discounted values to reflect the costs of the anticipated delay.<sup>88</sup> A third position is that the entire tort compensation system is inadequate and that all tort actions should be channeled into an administrative process where compensation would be made under new, and more readily managed, criteria.<sup>89</sup>

It is suggested here, at least in the context of mature mass torts, that none of these approaches is satisfactory. First, the transaction and opportunity costs associated with current methods of resolving mature mass torts are simply too high. It is not uncommon that sixty cents on the dollar goes to attorneys and administrators while only forty cents goes to plaintiffs.<sup>90</sup> Contingency fees of 30% to 40%, in cases like mature mass torts where there is no contingency on liability, appears excessive to many observers. In the typical asbestos case, if exposure to a specific defendant's product with resulting harm can be proved, the only question that remains is the amount of money to be awarded, not whether it will be awarded.

Second, the adage, "justice delayed is justice denied" still rings true. If defendants perceive problems with the current mass tort resolution process related to unfairness in outcomes because of the substantive law of liability and damages, then the answer is to change the substantive law. A solution based upon holding large numbers of mass tort plaintiffs hostage in a litigation gridlock cannot be viewed as appropriate.

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Elliott, *Why Courts? Comment on Robinson*, 14 J. LEGAL STUD. 799, 800 (1985) (stating that one possible, but not favored, solution to problems in the traditional causal regime in toxic tort cases is to "do nothing and permit the system to evolve by legal fiction").

<sup>88</sup> See S. CARROLL, JURY AWARDS AND PREJUDGMENT INTEREST IN TORT CASES 4-9 (1983).

<sup>89</sup> See, e.g., Schmaltz, *On the Financing of Compensation Systems*, 14 J. LEGAL STUD. 807, 812-18 (1985) (proposing a private or governmental mass tort no-fault compensation system); Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 542 (1984) (advocating, as an alternative to private liability for latent injury problems, shifting compensation responsibility to the government).

<sup>90</sup> See J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 40 (estimating that between 1980 and 1982, the average legal fees and expenses in asbestos personal injury litigation were about thirty-nine percent of the average compensation); Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 881 n.11 (1987) (citing Craft, *Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation*, 46 J. AIR. L. & COM. 895, 919 (1981), for proposition that attorneys can collect up to forty percent contingency fees in mass accident litigation).

Third, the mass tort phenomenon is a new one. In time, these torts will be routinely processed in the same manner as the "mass torts" of automobile and product liability litigation.<sup>91</sup> Until there has been ample opportunity to experiment and to propose methods for coping with mass tort cases, however, substantial resistance to wholesale change is likely. If the current system can not eventually be successfully adapted, then an administrative law approach appears more likely.

It is not the purpose of this Article to argue the merits of various proposed injury compensation schemes. Instead, the intention is to interject some suggested measures, short of wholesale reform, into the discourse on this subject. Specifically, this Article proposes a hybrid process that would reduce transaction costs without sacrificing the individualized treatment and intangible values associated with existing civil procedure. This process would be accomplished in four steps: (1) consolidating all cases of a single mature mass tort into one forum; (2) resolving all common issues in that forum; (3) collecting information concerning all injuries; and (4) developing a systematic process for resolving all remaining issues.

#### A. Consolidate

Mass torts already provide ample opportunity for the consolidation of cases for discovery purposes through multi-district litigation or under the Federal Rules of Civil Procedure. Once "mature," because there is little or no new evidence or law to be added to the decision-making process and trials have exhibited a free and fair opportunity for attorneys to play out a complete cycle of strategy, there is, arguably little benefit in conducting full-fledged individual trials. Yet, current laws, rules, and techniques for a consolidation on the merits for individual mass torts in multiple states are limited.<sup>92</sup> Variations in the applicable substantive law, the ability of parties to avoid consolidation through opt out provisions or by filing state court actions, and the jurisdictional limitations of the courts all confine consolidation actions. Numerous proposals have been made to rectify this situation—creating federal common law, national consensus law, or federal choice of law;<sup>93</sup> expanding federal or state class action rules;<sup>94</sup> adding to

<sup>91</sup> See D. HENSLER, M. VAIANA, J. KAKALIK & M. PETERSON, *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 10-11 (1987) (commenting that while mass latent injury cases have the potential for explosive growth, the explosion may be only temporary as the system slowly absorbs the backlog of cases).

<sup>92</sup> This problem may be compounded by plaintiffs' attorneys who believe that the class action device favors defendants and thus file numerous individual actions in the state courts. Coffee, *supra* note 31, at 710.

<sup>93</sup> See *In re No. Dist. Cal. "Dalkon Shield" IUD Prods.*, 526 F. Supp. 887, 915-17 (1987) (proposing a flexible approach to choice of laws as to punitive damages), *rev'd*, 693 F.2d 847 (9th Cir. 1982). See also Note, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180, 1216 n.171 (1983) (collecting commentary on federal common law proposals).

<sup>94</sup> See generally Mullenix, *Class Resolution of the Mass Tort Case: A Proposed*



federal jurisdiction;<sup>95</sup> modifying offensive and defensive collateral estoppel;<sup>96</sup> and amending the Anti-Injunction Statute.<sup>97</sup> Without one or more of these changes, a de facto or de jure consolidation for resolution of common issues simply lacks effect. The most promising proposal appears to be an addition to federal diversity jurisdiction for mass torts cases.

A second series of issues relates to the scope of consolidation. Potential plaintiffs include those who have filed a lawsuit, those whose causes of action have accrued but have not yet filed, and those whose causes of action have not accrued. Potential parties include the alleged tortfeasors, third party defendants, insurers, re-insurers, and excess carriers. The issue of the scope of appropriate parties can sometimes be so case-specific that any generalization that provides anything but flexibility will be problematic. These issues may best be resolved by a centralized decision-maker.

Finally, circumstances may exist where consolidation could be counter-productive. For example, if case aggregation becomes unmanageable, then common sense dictates a less global strategy. This issue may also be best resolved by the entity assigned the task of making consolidation decisions.

#### B. *Resolve Common Issues*

Multiple and potentially conflicting issues cut across lawsuits that involve large numbers of plaintiffs and defendants. Notwithstanding practical difficulties, the application of common legal principles to all relevant cases can result in substantial savings in transaction, opportunity, and error costs as well as an increase in equal treatment among plaintiffs.<sup>98</sup> The question then becomes which issues should be consolidated. Certainly, general liability and punitive damages are likely candidates. If common defenses or

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*Federal Procedure Act*, 64 TEX. L. REV. 1039 (1986); Note, *Was the 1966 Advisory Committee Right? Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 HARV. J. ON LEGIS. 461 (1988).

<sup>95</sup> See, e.g., Rowe & Silbey, *Beyond Diversity: Federal Multiparty, Multiform Jurisdiction*, 135 U. PA. L. REV. 7, 23-28 (1986).

<sup>96</sup> For a comprehensive examination of the use of collateral estoppel in mass tort cases, see generally Green, *supra* note 6.

<sup>97</sup> 29 U.S.C. § 101 (1982) (limiting federal power to issue injunctions in labor disputes). See also Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 508-09 (1987) (proposing the use of hybrid opt-out rights as a means of avoiding rigid applications of the Anti-Injunction Act).

<sup>98</sup> For instance, Judge Williams stated that in the California Dalkon Shield Litigation, *In re No. Dist. Cal. "Dalkon Shield" IUD Prods.*, 521 F. Supp. 1188, *modified*, 526 F. Supp. 887 (1981), *rev'd*, 693 F.2d 847 (9th Cir. 1982), the record disclosed that if the usual percentage (90%) of the 1000 class members settled their cases, the savings of judicial resources in the trial of the remaining 100 would amount to eight years of trial time and \$7 million in court expenses. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 328 (1983).

insurance coverage issues exist, they could be tried once for all the parties. In the case of prescription drugs, general causation issues could be tried in common. For other mass torts, the variations in dose and exposure may create insurmountable problems for a single resolution of general or specific causation. Similarly, potential differences in compensatory damages might preclude a single trial except for one establishing aggregate damage awards. Once again, the centralized decision-maker could best resolve these questions.

### C. *Gather Data On All Cases*

By determining the variables that drive case outcomes and by collecting data on previously resolved and pending cases, it is possible to reduce the uncertainties associated with the outcome and value of the total claims. Opportunities can be created thereby (1) enhancing the chances for settlement, (2) insuring that there is an optimal allocation of monies among plaintiffs, and (3) reducing transaction costs.

By disclosing relevant data from previously resolved cases concerning key variables that drive case outcomes and settlement values, new settlement opportunities can become available to the parties. Without this data, unless only one defendant is included in the litigation, no single entity is aware of the total value of previous settlements. No stated consensus would exist concerning the outcome determinative facts in any single or group of cases. By revealing this data, uncertainty concerning case worth is reduced.

Data collection can also identify case dispositive issues in previously resolved cases and then direct the parties to those issues for pending or future cases. This is particularly true if the parties are active participants and are confident about the data collection process. Data from the Ohio Asbestos Litigation suggest that full disclosure concerning previously resolved and pending cases will improve settlement chances. Once attorneys recognize that a relatively narrow legitimate range of values exists for any given case, then the potential for early settlement is increased, particularly if transaction costs exceed the difference between settlement figures. In addition, there still remains a possibility that the entire range of cases might settle at once, as in the A.H. Robins bankruptcy.

Comprehensive data on case variables and values also enable claims resolution facilities to operate with greater effectiveness. For example, when the benchmark values of mature mass torts attain a sufficient equilibrium, they can be used to establish current values, so long as like cases in similar jurisdictions are compared. A facility can then gauge the adequacy of available funds, evaluate effective settlement strategies, and be more confident in devising case resolution processes. In addition, through case comparison, a facility can assure that similar cases will be treated equally, thus adding predictability to the litigation system. The settlement process in general and the increasing use of high-low settlements in particular indicates that trial lawyers find predictability a positive value. Attorneys agree in advance that

no matter how high or low a jury award may go, they will respect their own limits and reduce trial outcome variance. Another benefit of data collection is its scientific value. By completing what amounts to an epidemiological study, the understanding of the underlying health problems presented by the litigation is substantially increased.

Finally, attorneys recognize that information does not have infinite value and that non-adversarial mechanisms are available to gather information. An analysis of the East Texas and Dalkon Shield data demonstrates that the parties generally agreed on a majority of the available information and that only an extremely small number of debated initial variables, that were outcome determinative critical variables, existed. It was simply not necessary or cost effective, therefore, to conduct overly extensive discovery. A centralized decision maker could, with appropriate assistance, maximize the benefits of this type of data collection.

#### *D. Systematize Resolution Of Individual Issues*

There are four potential outcomes if mature mass tort cases are consolidated, common issues decided, and data on previously resolved and pending cases gathered. First, there can be a global settlement accompanied by a method for distributing funds. Second, if the case is in bankruptcy or legislation is passed to expand existing powers, then a determination of a single monetary award as well as the creation of an award distribution system can be implemented. Third, the consolidated cases can be separated and remanded to their original courts for individual issue resolution. Finally, the court can design a claims resolution facility like the one described in the Dalkon Shield case to process the cases.

This last suggestion merits further consideration. Through routine processing of cases in a hybrid litigation-administrative format, courts can easily reduce transaction costs. The courts can also mandate substantial decreases in plaintiffs' attorneys fees and maintain control of defendants' attorney fees. Finally, courts can also reduce incentives for plaintiffs to hire attorneys, further decreasing transaction costs.

The reaction of the bar to this fourth suggestion might be more positive than expected, particularly if attorneys can participate in creating a claims resolution facility and there is a final recourse to trial by jury. The value of having attorneys work both with each other and with the court in designing the claims resolution process is noteworthy. In particular, attorneys would more readily accept abbreviated and less costly measures if they can participate in the deliberations—thereby developing confidence in the ability of this alternative to serve the interests of their clients.

The incentives for the parties to accept a claims resolution facility approach would largely be financial. While defendants would benefit substantially if settlement payments were made over time, the downside would be the requirement for a larger immediate payment. Given the time value of money and potentially slower claims settlement resolution, some defendants

would not find immediate payments attractive.<sup>99</sup> Yet, sufficient opportunities in the bargaining process still exist so that these problems could be successfully overcome. Possibilities include lower transaction costs, payments over time to correspond to claims resolution facility disposition rates, and potential structuring of individual settlements. Plaintiffs, if they could retain comparable values and satisfactory individual treatment, would also benefit. Net payments to plaintiffs who have attorneys can be compared to net payments to plaintiffs without attorneys or with less costly attorneys. The benefits envisioned under a claims resolution facility would be an outlay to the attorneys for both plaintiffs and defendants.

Problems arise, however, when the court and parties devise new mass tort-specific dispute resolution procedures. Doubt arises as to whether courts have sufficient authority to mandate alternative dispute resolution techniques on unwilling parties. Probably, a change in existing judicial power would need to be implemented. In addition, potentially harmful effects can be magnified when large numbers of cases are consolidated in any one court. If an error occurs, both the number of parties and the potential impact, will be greater than in the ordinary case management process. There is also a more subtle problem. Once large numbers of cases are consolidated and the prospects of a huge fund of money become apparent, the prism of financial gain tends to focus the attention of the key players. It may also accentuate the yearning of those who would otherwise be neutral in a more normal action. Finally, economies of scale may not be available if a mass tort is either too large or too small. It may be possible, however, to determine optimal size levels and a cottage industry involving the creation and operation of claims resolution facilities may result.

The prospect of resolving large numbers of mass tort lawsuits through a claims resolution facility, at a substantial savings in transaction costs, is an appealing one. Even at the cost of some of the traditional values associated with normal tort litigation, sufficient incentives exist on either side to seek this type of outcome. In mature mass torts, where liability is foreordained, and the only genuine issues that remain involve individualized compensatory damages, a routinized cost-effective claims resolution facility tailored to the needs of a specific tort could be close to an ideal compromise for solving existing perceived problems.

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<sup>99</sup> See S. CARROLL, *supra* note 88, at 3-4.